

CANADA / JUDGMENT

Afshar v. Gu

2024 BCSC 1331

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1331 Afshar v. Gu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Afshar v. Gu,

2024 BCSC 1331

Date: 20240725

Docket: M1912727

Registry: Vancouver

Between:

Ranita Afshar

Plaintiff

And

Sui Ping Gu

Defendant

Before: The Honourable Justice Douglas

Reasons for Judgment re Costs

Counsel for the Plaintiff:

D.V. Abreu

Counsel for the Defendant:

H.K. Sall

Written Submissions of Defendant:

Written Submissions of Plaintiff:

Written Reply Submissions of Defendant:

April 17, 2024

May 17, 2024

May 29, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 25, 2024

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I. OVERVIEW

[1] The plaintiff, Ranita Afshar, was involved in a motor vehicle accident on December 22, 2018 (the "Accident"). Thereafter, she commenced this personal injury action for damages.

- [2] Following an eight-day trial in June 2023, I awarded Ms. Afshar total damages of \$187,896.30 (before applicable deductions) pursuant to reasons for judgment indexed as Afshar v. Gu, 2023 BCSC 1992. At the conclusion of the trial, I ordered that, absent information of which I was unaware that might alter this view, Ms. Afshar was entitled to costs on the ordinary scale: Afshar at para. 231. The issue before me now is determination of the appropriate order for costs.
- [3] The defendant, Sui Ping Gu, seeks to vary the costs award based on two formal offers to settle he made before trial. He accepts that Ms. Afshar is entitled to costs up to the date of delivery of his first offer, but says that he ought to recover his costs thereafter. Ms. Afshar denies that the defendant's offers are appropriately considered in an award of costs and says that she ought to recover all her costs of this action.
- [4] The parties have reached an agreement regarding deductions to the cost of future care award pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. Accordingly, I need not address that issue.
- [5] For the reasons that follow, I conclude that Ms. Afshar is entitled to her costs on Scale B up to the date of expiry of the defendant's second offer. Thereafter, the parties shall bear their own costs.

II. THE TRIAL DECISION

- [6] The relevant facts are set out in the trial reasons. I begin by reviewing the issues at trial that are relevant to my analysis on costs.
- [7] The defendant admitted liability for the Accident; accordingly, the trial proceeded on damages issues alone: Afshar at para. 1.
- [8] Causation was a central issue at trial. Ms. Afshar was involved in eight car accidents before the Accident and one high-speed collision in 2021, after the Accident: Afshar at para. 2. A key dispute between the parties was the nature of Ms. Afshar's pre-Accident condition, and the impact of the significant post-Accident collision on her claims for damages, including, in particular, her alleged loss of earning capacity: Afshar at para. 2.
- [9] The defendant denied that the Accident caused Ms. Afshar's ongoing physical and mental health problems; he argued that her ongoing problems were instead due to her pre-existing psychological condition, injuries from her multiple previous motor vehicle accidents, and the subsequent car accident in 2021: Afshar at para. 116. Ms. Afshar claimed that she was well before the Accident and that the 2021 accident had no lasting negative impact on her condition: Afshar at paras. 14, 45, and 128.
- [10] I made the following findings regarding causation at trial:
- a) Ms. Afshar had a pre-Accident vulnerability to the physical and psychological effects of trauma (Afshar at paras. 117 and 125);

- b) Ms. Afshar likely had chronic soft tissue pain before the Accident (Afshar at para. 120);
 - c) There was a notable lack of objective evidence about Ms. Afshar's level of function in the immediate pre-Accident period (Afshar at para. 124);
 - d) It is improbable that Ms. Afshar was completely well in the year immediately before the Accident (Afshar at paras. 121 and 124);
 - e) Ms. Afshar's pre-existing injuries had improved but likely not resolved by the time of the Accident (Afshar at para. 124);
 - f) Ms. Afshar provided the experts with inaccurate information about her pre-Accident medical history (Afshar at paras. 125-126);
 - g) The Accident triggered Ms. Afshar's pre-existing vulnerability to the physical and psychological effects of trauma (Afshar at para. 129);
 - h) The Accident aggravated Ms. Afshar's pre-existing soft tissue injuries, headaches, and knee pain (Afshar at para. 129);
 - i) The Accident caused Ms. Afshar's PTSD, depressive disorder, anxiety symptoms, chronic pain syndrome, undiagnosed TMJ symptoms, and medication-related headaches and hyperalgesia (Afshar at para. 129);
 - j) The Accident did not cause a thoracic outlet syndrome, piriformis syndrome, mild traumatic brain injury, or driving phobia (Afshar at paras. 130-131);
 - k) The 2021 accident probably worsened Ms. Afshar's physical and mental health and either aggravated an old knee injury or caused a new bilateral knee injury (Afshar at para. 128); and
 - l) Given the severity of the 2021 accident, Ms. Afshar's condition was probably not materially different thereafter than it would have been if the Accident had not occurred (Afshar at paras. 194 and 199).
- [11] Ms. Afshar's symptoms from her alleged ongoing Accident-related injuries were predominantly subjective: Afshar at para. 150. Ms. Afshar's credibility and the reliability of her evidence were therefore of critical importance in the overall assessment of her claims for damages: Afshar at para. 98.
- [12] I made the following findings regarding Ms. Afshar's credibility and the reliability of her evidence at trial:
- a) Ms. Afshar was a poor historian and an unreliable witness (Afshar at para. 99);
 - b) She provided incomplete, inaccurate, and inconsistent factual information to the experts who assessed her in connection with this litigation (Afshar at paras. 88, 101, and 125-126);

- c) She distorted her work history in her discussions with the experts who assessed her before trial (Afshar at para. 99);
 - d) The material inaccuracies and inconsistencies in Ms. Afshar's reported history undermined her credibility and the reliability of her evidence (Afshar at paras. 99 and 102);
 - e) Ms. Afshar has a heightened and distorted perception of her own disability (Afshar at para. 101);
 - f) Some of her responses appeared to be exaggerated on assessment by some experts (Afshar at paras. 101-102);
 - g) Some experts identified discrepancies between Ms. Afshar's demonstrated abilities during formal testing and their informal observations (Afshar at para. 101); and
 - h) I was unable to rule out the possibility of financial gain providing an unconscious motive for Ms. Afshar (Afshar at para. 102).
- [13] Given these findings, I approached Ms. Afshar's trial evidence with caution: Afshar at para. 102.
- [14] Ms. Afshar's most substantial claims were for the loss of past and future earning capacity; together they totalled \$925,000. I made the following findings of fact regarding Ms. Afshar's loss of earning capacity:
- a) Ms. Afshar had not been employed full-time since she immigrated to Canada in 2006 (Afshar at para. 179);
 - b) Ms. Afshar was not employed in any capacity at the time of the Accident (Afshar at para. 167);
 - c) Ms. Afshar distorted her pre-Accident work history in her discussions with the experts who assessed her in connection with this litigation (Afshar at paras. 99 and 167);
 - d) Ms. Afshar's claim for past income loss, based on a hypothetical return to full-time work by 2022, was not supported by the trial evidence (Afshar at para. 174); and
 - e) The 2021 accident was an unrelated intervening event and thereafter, Ms. Afshar's capacity to work was not materially different than it would have been if the Accident had not occurred (Afshar at paras. 194-199).
- [15] Ms. Afshar sought total damages of \$1,387,846 at trial, comprising:
- a) Non-pecuniary damages of \$220,000 (Afshar at para. 142);
 - b) A separate award in the amount of \$75,000 for the loss of housekeeping capacity (Afshar at para. 152);
 - c) Agreed special damages of \$7,846.30 (Afshar at para. 161);

- d) Loss of past earning capacity in the amount of \$75,000 (Afshar at para. 172);
- e) Loss of future earning capacity in the amount of \$850,000 (Afshar at para. 187); and
- f) Future care costs in the amount of \$160,000 (Afshar at para. 203).

[16] The total damages award at trial was \$187,896.30, comprising:

- a) Non-pecuniary damages of \$140,000;
- b) Agreed special damages of \$7,846.30;
- c) Loss of past earning capacity in the amount of \$12,000; and
- d) Future care costs in the amount of \$28,050.

[17] Ms. Afshar received no award for the loss of future earning capacity: Afshar at para. 200. She recovered less than 15% of the damages she sought at trial.

III. THE OFFERS

[18] The defendant made two formal offers to settle this action: the first on May 26, 2023; and the second on June 1, 2023. Ms. Afshar accepted neither offer.

[19] Before the defendant served the first of his two formal offers to settle:

- a) Defence counsel had conducted an examination for discovery of Ms. Afshar in this action on May 20, 2022;
- b) The parties had served the expert reports on which they intended to rely at trial by March 6, 2023; and
- c) A trial management conference had proceeded on April 27, 2023.

[20] The defendant's first formal offer to settle proposed settlement of this action on the following terms:

- a) Payment by the defendant to Ms. Afshar in the amount of \$237,500, net of s. 83 deductions;
- b) Costs and disbursements on Scale B payable to Ms. Afshar to the date of delivery of the offer and thereafter, payment of costs to the defendant; and
- c) The offer was open for acceptance until 4:00 pm on the last business day before trial (i.e., Friday, June 2, 2023).

[21] On May 26, 2023, Ms. Afshar served her own formal offer to settle. This offer contemplated payment by the defendant to Ms. Afshar in the amount of \$652,000, net of s. 83 deductions, plus costs and disbursements at Scale B until the date of delivery of the offer, and thereafter double costs to the date of acceptance. This offer remained open for acceptance until the trial commenced on June 5, 2023. The defendant did not accept this offer.

[22] The defendant's second formal offer to settle, proposed settlement of this action on the following terms:

- a) The defendant's previous offer was revoked;
- b) Payment by the defendant to Ms. Afshar in the amount of \$372,853.85, net of s. 83 deductions;
- c) Costs and disbursements on Scale B, payable to Ms. Afshar to the date of delivery of the offer and thereafter, payment of costs to the defendant; and
- d) The offer remained open for acceptance until 4:00 pm on the last business day before trial (i.e., Friday, June 2, 2023, the following day).

IV. LAW AND ANALYSIS

A. Relevant Principles

[23] Rule 14-1(9) of the Supreme Court Civil Rules provides that costs must be awarded to the successful party in a proceeding unless the court otherwise orders.

[24] There is a strong presumption that costs follow the event; the onus is on the party who seeks an order contrary to this presumption: *Gichuru v. Pallai*, 2019 BCSC 226 at para. 14, rev'd on other grounds 2020 BCCA 374.

[25] Rule 9-1 governs offers to settle. Rule 9-1(5) sets out the costs options a court may consider when a party makes an offer to settle:

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[26] The factors outlined in R. 9-1(6) guide the court's exercise of discretion in making an order under R. 9-1(5). They include:

- a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- b) the relationship between the terms of settlement offered and the final judgment of the court;
- c) the relative financial circumstances of the parties; and
- d) any other factor the court considers appropriate.

[27] None of the factors in R. 9-1(6) are mandatory: *Bains v. Antle*, 2019 BCCA 383 at para. 42. A trial judge has broad discretion under R. 9-1(6): *Tisalona v. Easton*, 2016 BCSC 1210 at para. 28, *aff'd* 2017 BCCA 272.

B. Was the plaintiff successful at trial?

[28] Ms. Afshar says that she was the successful party at trial and is therefore presumptively entitled to costs: *Parker v. Martin*, 2017 BCSC 1161 at para. 16.

[29] At its most basic level, the successful party in a negligence claim is a plaintiff who establishes liability and obtains a remedy (whether or not the award was less than the amount sought) or a defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at paras. 46-47, leave to appeal to SCC *ref'd*, 35893 (4 September 2014).

[30] Ms. Afshar was not required to establish liability at trial; the defendant admitted liability before trial. Ms. Afshar obtained an award at trial that was substantially less than the damages she claimed: she sought almost \$1.4 million in damages; the total trial award was less than \$200,000.

[31] Despite the significant disparity between Ms. Afshar's claim for damages and the trial award, I accept that this is not the measure of success under R. 14-1(9). In *Loft*, the Court of Appeal found that while the respondents had been largely successful in all areas at trial, Mr. Loft, the appellant, was the successful party. Mr. Loft sought more than \$3 million in damages. The trial judge found that he had a pre-existing condition, personality disorders, and credibility issues; he awarded total damages of \$62,900 and dismissed Mr. Loft's claims for the loss of future earning capacity and future care costs.

[32] As in *Loft*, this is a claim for damages for personal injuries following a motor vehicle accident that occurred as a result of the defendant's negligence. I accept that, as the successful party, Ms. Afshar is presumptively entitled to costs of the proceeding. However, that conclusion does not end the matter. An offer to settle under R. 9-1 may warrant departure from the usual rule. Accordingly, I next consider the factors enumerated in R. 9-1(6).

C. Were the offers ones that ought reasonably to have been accepted?

- [33] Whether an offer to settle is one that ought reasonably to have been accepted is assessed, not by reference to the award that was ultimately made, but to the circumstances that existed when the offer was open for acceptance: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 97. This factor is considered from the perspective of the person receiving the offer. It has both subjective and objective components in that the court must consider the reasons a party rejected an offer and whether those reasons are objectively reasonable: *C.P.* at para. 97; *Pang v. Burns*, 2021 BCSC 2430 at para. 47. There is no affidavit evidence from Ms. Afshar before me.
- [34] Rules 9-1(5) and (6) are not intended to punish parties whose assessment of the value of their claim proves incorrect, unless that assessment was based on irrelevant considerations or a clearly inadequate review of the available evidence and authorities, or was unreasonable in view of the facts known at the time: *Zhao v. Yu*, 2015 BCSC 2342 at para. 13.
- [35] The parties' submissions focus on two broad themes: 1) whether service of the defendant's offers shortly before trial allowed Ms. Afshar a reasonable opportunity to consider them; and 2) whether Ms. Afshar's decision not to accept the defendant's offers was reasonable in light of the expert opinions and evidence available to her when the offers remained open.
- [36] The defendant served his first offer about one week before trial. He denies it can be characterized as a "last minute surprise" which Ms. Afshar was unable to review with her lawyer. The defendant asserts that Ms. Afshar had many opportunities to discuss with her lawyer the weaknesses that defence counsel identified in her case, including concerns related to Ms. Afshar's credibility.
- [37] The defendant served his second offer on Thursday, June 1, 2023; it remained open for one day until Friday, June 2, 2023 at 4:00 pm. Ms. Afshar denies this offer warrants any consideration due to its late timing and short expiry period: *Deol v. Sheikh*, 2017 BCSC 1343, and *Parker*. The defendant cites *Lin v. Koszmider*, 2024 BCSC 135, where the court found that the plaintiff ought to have accepted an offer that was open for only four days before trial.
- [38] In *Bennett v. Scanlan*, 2010 BCSC 50, cited in *Lin* at para. 12, the court found that two days was sufficient to allow a plaintiff to assess a defendant's second offer to settle, having had time to consider the defendant's first offer. Ultimately, what is reasonable will depend on the circumstances of the case: *Parker* at paras. 22-23, citing *Tenhunen v. Tenhunen*, 2015 BCSC 955 at para. 25, and *Henry v. Bennett*, 2014 BCSC 1963 at para. 32.
- [39] I conclude that, considered in the context of the parties' ongoing negotiations, the first offer provided Ms. Afshar, who was represented by counsel throughout, a reasonable period of time within which to consider it. I accept that the second offer was open for only a brief period of time in the final two business days before the start of trial. I conclude that Ms. Afshar and her lawyer would likely then have been prepared for trial and in a position to consider the defendant's second offer relatively quickly, having already had time to consider

his first offer.

- [40] Ms. Afshar argues that, by the time she received the defendant's first offer, she had already incurred the cost of retaining experts whose opinions she believed supported her claim for the loss of future earning capacity: Parker at para. 26. She denies it was unreasonable for her to reject the defendant's offers to settle when she had received expert opinions supporting her claim: Zhao at para. 31; Tisalona at para. 37; and Prasad v. Ross-Smith, 2023 BCSC 1394 at para. 26.
- [41] Ms. Afshar says it is unreasonable to expect that she would have considered the 2021 accident to bar an award for the loss of future earning capacity at the time the offers were open for acceptance. Causation was always in issue in this negligence claim. It was well-known to Ms. Afshar that her involvement in multiple car accidents, before and after the Accident, and the nature of any corresponding injuries and resulting disability, would be in issue at trial.
- [42] Ms. Afshar provided all of the experts who assessed her with a subjective history; notably, it included some inaccurate and misleading information. In my view, Ms. Afshar would reasonably have known when the defendant served his two offers to settle that: 1) her assessment of damages was dependent on the accuracy of the subjective history she provided to the experts who assessed her; 2) her complaints were largely subjective; and 3) this meant that her decision to proceed to trial involved increased risk. There is more risk in proceeding to trial when, as here, a claim lacks objective evidence: Bains at para. 37. I also conclude that the defence expert reports might reasonably have given Ms. Afshar cause to reconsider her own assessment of damages.
- [43] In my view, the defendant's offers were reasonable, fell within the range of reasonable possible outcomes at trial, and were offers that Ms. Afshar could reasonably have accepted. I recognise that the defendant's first offer contemplated a fraction of what she hoped to recover, if all of her evidence and that of her experts, was accepted. Liability was admitted and Ms. Afshar had secured some support for her damages claim. I accept that giving up the opportunity to pursue a substantially larger damages claim by not accepting the defendant's first offer, was not the only reasonable alternative open to Ms. Afshar: Kobetitch at para. 41. While the defendant's second offer remained open for acceptance for only a brief period, I conclude that, by then, Ms. Afshar would have had an opportunity to canvas the defendant's first offer with her lawyer and to have assessed her own position. In my view, the defendant's substantially higher second offer could be construed as one that Ms. Afshar ought reasonably to have accepted.

[44] Ultimately, Ms. Afshar chose to adopt an aggressive strategy given the significant risks she faced at trial, including her involvement in multiple other accidents, the subjective nature of her Accident-related injuries, inaccuracies in the history she provided to the experts who assessed her, and issues regarding her credibility and the reliability of her evidence. In my view, consideration of this factor favours the defendant and the imposition of some cost consequences to Ms. Afshar.

D. What is the relationship between the offers and the result at trial?

[45] This factor is the mirror image of the first factor and provides the court with an objective measurement of the reasonableness of the offer and the decision to reject it: C.P. at para. 99.

[46] The trial award in this case was about 20% less than the defendant's first offer, and about 50% less than the defendant's second offer. While not determinative, I find that the disparity between the offers (in particular the second offer) and the trial judgement weighs in favour of the defendant: Clubine v. Paniagua, 2018 BCSC 1076 at para. 24.

E. What are the parties' relative financial circumstances?

[47] The parties disagree about whether or not ICBC's defence of this action is a relevant factor. Ms. Afshar says that the disparity in the parties' respective financial resources is relevant to an assessment of costs. The defendant denies this factor is relevant, absent evidence that he exploited ICBC's position of relative financial strength in an abusive or unfair manner. There is no such evidence here.

[48] In Zhao, Justice Baker decided the fact that an insurer had defended the action was relevant to her analysis on costs. The plaintiff in that case had a limited income and supported a wife and daughter with significant disabilities. In that context, Baker J. concluded that denying the plaintiff costs, or awarding costs to the defendant, would erode the trial award and undercompensate the plaintiff for his losses arising from the defendant's negligence: Zhao at para. 10.

[49] The defendant submits that Zhao was wrongly decided on this point and that I ought to prefer the more recent decision of Chief Justice Hinkson (as he then was) in Lin. Relying on his earlier reasons in Bailey v. Jang, 2008 BCSC 1372 at paras. 33-35, Hinkson C.J. declined to follow Zhao; he held that the resources of a defendant's insurer are not properly considered within the rubric of the parties' relative financial circumstances: Lin at paras. 20-21. He found this factor to be neutral, absent evidence respecting the defendants' individual financial circumstances: Lin at para. 22. I adopt the same approach here.

- [50] Insurance coverage is not automatically a factor to be weighed against the insured party; the facts of a particular case will determine whether or not this factor should be considered and, if so, to what extent: C.P. at para. 101. In this case, as in C.P., there is no evidence that the defendant's insurer exploited its financial strength to its own advantage in this action: C.P. at para. 102. I conclude that ICBC's involvement in this action as the defendant's insurer is irrelevant to my analysis on costs: C.P. at para. 102; Pang at para. 53; Clubine at para. 25.
- [51] Where the plaintiff (as here) has not disclosed the nature of her retainer, the parties' relative financial circumstances cannot be assessed: *Kostinuk v. Fellowes*, 2015 BCSC 2327 at para. 12. As in *Kobetitch* at para. 45, Ms. Afshar was not prevented by her financial circumstances from presenting a sophisticated claim supported by many expert reports. Absent evidence about the defendant's financial circumstances, this factor is neutral: Lin at para. 22.
- [52] Ultimately, I conclude that the parties' relative financial circumstances are not a material consideration here: *Kobetitch* at para. 47; *Brewster v. Li*, 2014 BCSC 463 at para. 37.

F. Are there any other relevant factors?

- [53] One party's failure to engage in meaningful negotiations after receiving a settlement offer can be relevant in assessing costs: *Qiao v. Owners, Strata Plan LMS 3863*, 2020 BCSC 1500 at para. 46. Ms. Afshar made no counter-offer in response to the defendant's second offer. Admittedly, this offer was served only two business days before the start of trial.

G. Conclusion

- [54] The rationale underlying the rules on costs and offers to settle is to promote the early settlement of disputes; parties who make reasonable offers to settle may be rewarded, and parties who do not accept such offers may be penalized: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [55] There was no doubt that Ms. Afshar would succeed at trial: the defendant had admitted liability. The only question was the degree of her success: *Wafler v. Trinh*, 2014 BCCA 95 at para. 65.
- [56] Ms. Afshar was represented by counsel throughout in this action. By the time the defendant served his offers, she had presumably received the benefit of legal advice and was well-placed to evaluate the offers. In my view, the defendant's offers were reasonable, substantive, and represented a genuine compromise and incentive to settle. While it was within Ms. Afshar's prerogative to reject these offers, she risked recovering a smaller amount at trial by doing so. As in *Kobetitch*, I concluded that this was a significant risk and that Ms. Afshar must be taken to have understood that fact: para. 49.

- [57] A plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs; to find otherwise would undermine the importance of certainty and consequences in applying the rules regarding offers to settle: *Wafler* at para. 81. Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497 at para. 19.
- [58] Ms. Afshar describes the costs orders the defendant seeks as punitive. Based on the parties' respective bills of costs, she says that she incurred approximately \$56,000 in costs and disbursements after the defendant delivered his first offer on May 26, 2023, while the defendant incurred \$44,000. Ms. Afshar therefore says that, if she is denied her costs for this period, and the defendant is awarded costs, the resulting "punishment" to her would be approximately \$100,000. The defendant disagrees, saying he seeks compensatory costs following Ms. Afshar's failure to accept either of his legitimate offers to settle.
- [59] In my view, the defendant's offers did not represent their best-case scenarios; rather, they were reasonable assessments of Ms. Afshar's claim at the time. In all the circumstances, I conclude that there should be some cost consequences arising from Ms. Afshar's decision to refuse the defendant's two substantive offers. In my view, it would be unfair to require the defendant to pay Ms. Afshar for the costs of advancing to trial a claim that was ultimately judged to be greatly overvalued: *Desharnais v. Parkhurst*, 2014 BCSC 758 at para. 44.
- [60] I do not agree that effectively depriving Ms. Afshar of the whole trial award is an appropriate outcome in this case: *Tisalona* at para. 38. Courts ought to grant some leeway to plaintiffs who hold honest but ultimately mistaken views of their claims: *Fan* at para. 19.
- [61] I award Ms. Afshar her costs up to the date of expiry of the defendant's second offer; thereafter, the parties shall bear their own costs. This decision deprives Ms. Afshar of her trial costs. Ms. Afshar assumed the risk of an adverse decision on costs when she chose to reject the defendant's substantive offers and elected to proceed to trial in the face of significant risks associated with potential adverse findings regarding her credibility, the reliability of her evidence, the impact of her pre-existing medical condition, and the 2021 accident on her claims for damages.
- [62] I do not award costs to the defendant. Doing so, while denying Ms. Afshar her trial costs, would significantly erode the award of damages and undercompensate Ms. Afshar for the losses the defendant's negligence caused: *Prasad* at para. 25.

V. DISPOSITION

- [63] I award Ms. Afshar costs up to the date of expiry of the defendant's second offer (i.e., 4:00 pm on Friday, June 2, 2023). Thereafter, the parties shall bear their own costs.

"Douglas J."

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